No. 56363-1

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

SIYA SIM,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF LABOR
&
INDUSTRIES, a Washington State agency; "DOE(S) 1-100," employees of STATE OF WASHINGTON DEPARTMENT OF LABOR & INDUSTRIES; and "CORPORATION(S) XYZ 1-100,"

Respondents.

REPLY BRIEF OF APPELLANT

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RCW 49.60.210

I. INTRODUCTION

Ms. Sim appeals the dismissal of her discrimination case against her employer Respondent L&I. The grant of summary judgment was in error and must be reversed because justification provided by the decision maker's, Michelle Schiller, Chris Huynh, Jimmy Huynh, and Victoria Kennedy, for Sim's discipline, demotion and termination raise genuine questions of fact regarding the motivation for their decision.

Ms. Sim is part of a protected class and was a dedicated employee for over twenty (20) years. (CP 320). Ms. Sim received positive performance reviews throughout her employment. (CP 320). It was only until Michelle Schiller became her supervisor in 2014, that Ms. Sim faced work performance issues.

At this time, Ms. Sim observed a clique led by Ms. Schiller, and which included Ms. Sim's two other co-workers who were not part of a protected class and who performed the same work as Ms. Sim. Ms. Sim declared

that Ms. Schiller managed her under a higher level of scrutiny than her co-workers.

When Chris Huynh became her new manager, Ms. Sim observed that Mr. Huynh and Ms. Schiller formed a close relationship and that he became a part of her clique and, together, they treated Ms. Sim with a negative bias because English was not her first language and she spoke with an accent. As managers, their treatment of her formed a workplace climate of hostility and intimidation against Ms. Sim. (CP 320).

Ms. Sim filed a grievance against Mr. Huynh on April 21, 2015. Julie Newby, who had been with the Pension department for 22 years, was interviewed by L&I Investigator Lynn Buchanon in response to Ms. Sim's grievance. Ms. Newby stated that, "people in the unit have made comments and she is sure that Complainant has heard them" and added that, "there is a lot of "clicking" going on." (CP 79).

Ms. Sim only needs to provide, at minimum,

circumstantial evidence of race discrimination in order to survive a Defendant's motion for summary judgment. *Scrivener v. Clark Coll.*, 181 Wash. 2d 439, 445 (2014) (citing *Riehl v. Foodmaker, Inc.*, 152 Wash. 2d 138, 149 (2004)). Ms. Sim's ultimate burden is to show that race was a substantial motivating factor, but not the only factor.

An employer may be motivated by multiple reasons, both legitimate and illegitimate, and still be liable under the Washington Law Against Discrimination. *Scrivener v. Clark Coll.,* 181 Wn.2d 439, 334 P.3d 541 (2014).

Ms. Sim has shown that a genuine issue of fact exists as to whether race was a substantial motivating factor and has provided enough evidence where a trier of fact could reasonably infer the existence of race discrimination. Accordingly, based on facts in the record, Ms. Sim presents sufficient evidence that a genuine issue of fact exists as to her remaining claims, therefore, summary judgment should be reversed.

II. ARGUMENT

A. Summary Judgment fails because the decision maker's justification for Appellant's discipline and termination raises a genuine issue of fact

Washington Appellant courts, "review judgments de novo, and conduct the same inquiry as the trial court considering all facts in the light most favorable to the moving party." *Domingo v. Boeing Employees' Credit Union*, 124 Wash.App. 71, 78, 98 P. 3d 1222 (2004). "As a general matter, the plaintiff in an employment discrimination action, need to produce very little evidence in order to overcome an employer's motion for summary judgment. This is because the ultimate question is one that only be resolved through a searching inquiry – one that is most appropriately conducted by a fact finder, upon a full record." *Schnidrig v. Columbia Mach*., Inc., 80 F. 3d 1406, 1410 (9th Cir., 1996).

"The 'requisite degree of proof necessary to establish a a prima facie case…is minimal and does not even need to rise to the level of preponderance of the evidence." Fulton v. Dep't of Social & Health Servs. 169 Wn. App. 137. 152m 279 P. 3d 500 (2012). To establish a case of race discrimination, Ms. Sim must

show that she (1) belongs to a protected class, (2) she was treated less favorably in the terms or conditions of her employment, (3) she and the non-protected comparators were doing substantially similar work. *Washington v. Boeing Co.,* 105 Wn. App. 1, 13, 19 P. 3d 1041 (2000).

Respondents concede that Ms. Sim is part of protected class and that she was doing substantially similar work that her two non-protected comparators. (CP 273). Ms. Sim asserts that Ms. Schiller and Mr. Huynh were bias toward her because she spoke with an Cambodian accent. (CP 320) This led her to being treated less favorably in the terms and conditions of her employment. Further describing this climate, Ms. Newby stated in her interview that people made comments about Ms. Sim and that she was sure that Ms. Sim heard them. (CP 79).

If the employer articulates a non-discriminatory reason for treatment, the burden shifts back to the plaintiff to show that race was a substantial motivating factor. Here, Respondent L&I asserts that Ms. Sim was subject to discipline due to work performance issues which for purposes for summary judgment

are construed as a “legitimate” reason for employer treatment. However, Ms. Sim asserts that she was bullied, mocked, and outcasted due to speaking English as a second language and Ms. Schiller and Mr. Huynh were bias toward her because she spoke with a Cambodian accent. This made it uncomfortable for Ms. Sim to ask questions or seek guidance because she was treated like an outsider and foreigner. Ms. Newby, who had been in the pension department for 22 years, confirmed that comments were made about Ms. Sim and that Ms. Sim heard them.

Accordingly, the Washington Supreme Court has held that, given the remedial purpose of the WLAD, "the statutory protections against discrimination are to be liberally construed and its exceptions narrowly confined." *Phillips v. City 4 of Seattle*, 111 Wn.2d 903, 908, 766 P. 2d 1099 (1989)(internal citation omitted).

1. An issue of fact exists as to whether race was a substantial motivating factor

A plaintiff asserting race discrimination under the WLAD must show that race was a substantial motivating factor, regardless of

whether other "legitimate" considerations may have been factored in. *Mackay v. Acorn Custom Cabinetry, Inc*., 127 Wn.2d 302, 310, 898 P. 2d 284 (1995). Washington courts have adopted the substantial factor test in cases involving discrimination. The substantial factor test is appropriate in these cases, where causation is difficult to prove, largely due to public policy considerations that strongly favor eradication of discrimination and unfair employment practices. See, e.g., *Mackay*, 127 Wash.2d at 309 - 10, 898 P.2d 284

Ms. Sim contends that she was bullied, mocked and outcasted due to speaking English as a Second Language. In one-on-one meetings with Ms. Schiller and Mr. Huynh, she was talked down to and treated like a second-class person and foreigner.

To survive summary judgment on a racial discrimination claim, substantial motivating factor is a burden of production not persuasion, and may be proved through direct or circumstantial evidence. *Riehl v. Foodmaker, Inc.,* 152 Wn. 2d 138, 149, 94 P.3d 930 (2004).

2. An issue of material fact exists as to whether L&I's evaluation of Ms. Sim's work

performance was fair or objective

The decision makers, Michelle Schiller, Chris Huynh, Jimmy Huynh, and Victoria Kennedy of Respondent L&I argue that the basis for Ms. Sim's disciplinary actions, demotion, and eventual termination were fair and objective**.**

However, all of the decision makers fail to address 1) the lack of evidence of complaints against Ms. Sim, 2) the basis for giving Ms. Sim a disciplinary letter for two minor administrative errors over 5 months after the alleged administrative errors occurred, 3) the familial relationship between brothers, Chris and Jimmy Huynh who managed Ms. Sim indicating evidence of bias, 4) the higher standard used to score Ms. Sim during her trial service period (CP 428, CP 138, CP 141), 5) the inexplicable and numerous discrepancies of Ms. Sarah Gonzales' scoring and evaluation of Ms. Sim during her trial service period (CP 132-136, CP161), and 6) Mr. Jimmy Huynh's inexplicable and abrupt decision to end Ms. Sim's trial service period early when she was exceeding her accuracy and productivity scores and when Ms.

Sarah Gonzales, her manager during her trial service period,

recommended that her trial service period be extended. (CP 442)

First, to date, Respondent L&I asserts that Ms. Sim received many customer complaints between 2014 - 2016. However, these alleged complaints are solely reported by Ms. Schiller and Mr. Chris Huynh. Outside of their self-reporting, there is no evidence in the record of any complaints submitted directly from a customer. (CP 256, 263-267, 269-270). The lack of evidence of complaints received directly from customers presents an issue of fact as to whether Ms. Sim was delivering poor customer service or as to whether she was being targeted by her managers Ms. Schiller and Mr. Chris Huynh.

Second, the basis of the disciplinary letter given to Ms. Sim on January 6, 2016 was that she had allegedly made two administrative errors. (CP 384). The first alleged error was entering the wrong address of the client. The address was a handwritten foreign address and nearly illegible. (CP 393). The second alleged error was for mistakenly notifying a pensioner that his packet was incomplete which caused, “confusion”.

(CP 385). These errors are minor in scope and present an issue of material fact as to reasonableness of the discipline of reduction in pay in relation to the two errors and whether it was fair or objective.

Third, Ms. Sim asserts that she continued to face harassment and bullying after she was demoted to an OA2 position, especially from her new supervisor, Mr. Jimmy Huynh who is the brother of Chris Huynh, her former manager. (CP 322). Their familial relationship as brothers presents an issue of fact as to whether there was bias toward Ms. Sim which caused a continuation of a hostile work environment and a continued pattern of retaliation. Fourth, Respondent L&I also fail to address that Ms. Sim was held to a higher standard during her trial service period. According to her performance plan, Ms. Sim was required to meet a QA score of 98% or better. (CP 428). However, she was consistently held to a higher standard of meeting a required score of 98.5% or higher. (CP 138, 141). In fact, she was told that she was not meeting expectations because she was not meeting the QA score requirement of 98.5% or higher (CP 215). Respondent

L&I fail to provide a justifiable reason for arbitrarily raising the QA score requirement which presents an issue of fact as to whether their conduct was fair or objective leading to evidence of pretext and retaliation against Ms. Sim.

In addition, as it relates to keying bill type, the performance plan indicated that the trial service period would be divided into two phases with specific bill types for each phase. (CP 439-40) However, Ms. Sim was evaluated on her ability to key bills of Miscellaneous type throughout the entire duration of the trial service period, which constitutes a higher metric outside the requirement of her performance plane and results in a major discrepancy as to whether her evaluation of BPH was fair and objectively measured. (CP 164-98)

Fifth, the progress notes and spreadsheets provided by Ms. Sarah Gonzales that documents Ms. Sim's performance during her trial service period contain many discrepancies and present an issue of material fact as to whether Ms. Sim was performing satisfactorily as well as to the credibility and objectivity of Ms. Sarah Gonzales' evaluation. Based on Ms. Sarah Gonzales'

declaration, the scores in her own training notes contrast with scores in her excel spreadsheets for dates of August 2, 3, 4, 8, 9 and 10. (CP 132 - 137, 194). Further in Ms. Gonzales' declaration, she submitted another spreadsheet, referencing Appellant Sim's scores under 3X, which contrasts with the scores in her training notes and her previous excel spreadsheets. (CP 161).

Sixth, despite the requirement to reach higher metrics than required in her performance plan, Ms. Sim began to surpass her accuracy and productivity requirements beginning June 30th, 2017. In response, Mr. Jimmy Huynh inexplicably and abruptly ended her opportunity to complete her trial service period nearly three months before her trial service period was to end. (CP 426). In a meeting with Ms. Sim, Mr. Jimmy Huynh explained that, Ms. Sim, "was not meeting work expectations and had not been successful in her trial service period," even though she was still in the middle of her trial service period and after Ms. Sarah Gonzales recommended that Ms. Sim's trial service period be extended. (CP 442). All these decisions present an issue of fact as to whether Respondent L&I's evaluation of Ms. Sim work

performance was fair and objective or whether Respondent L&I acted with pretext and retaliatory motives.

3. An issue of material fact exists as to whether Ms. Sim was performing satisfactorily at the time of her termination

Under the satisfactory work prong, an employee must present facts that demonstrate his or her work performance is a genuine issue of material fact; the employee's subjective characterization of his or her work is insufficient. *See Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 73 P.2d 517 (1988). Out of Ms. Sim's 23 plus years of service to L&I, Ms. Sim maintained positive performance as documented in her performance reviews.

Further, she frequently exceeded her QA score requirement of 98% or higher according to her performance plan of her trial service period. Beginning June 30th, 2017, Ms. Sim surpassed her accuracy and productivity scores indicating that she was meeting performance expectations of her trial service period. (CP 128-31, 187-91).

However, on August 4, 2017, Mr. Jimmy Huynh informed her that she was not successful, and that she was not meeting work expectations and therefore, he was ending her trial service period early. Mr. Jimmy Huynh did not address that Ms. Sim was, at the time, exceeding her performance expectations. Ms. Sim's termination letter on August 15, 2017 stated that she was being terminated because she did not satisfactorily complete her trial service period. (CP 450).

In *Tosch v. YWCA Pierce County,* the court found that Tosch presented sufficient circumstantial evidence that her work performance was satisfactory and that she had presented sufficient evidence that YWCA Pierce County's justification termination of her was pretextual. The court found that the YWCA did not document that Tosch's "poor" work performance to terminate her. *Tosch v. YWCA Pierce County, Id.* The only documented unfavorable review of Tosch's work,

that Tosch was aware of, came shortly before her termination through Rundle's evaluation that rated her as "Needs Improvement" but not "Unsatisfactory". The absence of poor

work performance is circumstantial evidence that the employer's

reasons for termination were fabricated. *Tosch v. YWCA Pierce County, Id.*

Here, Respondent L&I went against the performance expectations in Ms. Sim's performance plan and arbitrarily raised the requirements of her trial service period. When she met these performance expectations despite being subjected to higher metrics, Respondent L&I ended her trial service period early without acknowledging that she was surpassing accuracy and productivity expectations. At issue is whether Ms. Sim was performing satisfactorily at the time of her abrupt termination which is a material fact which should be resolved by a jury.

B. Ms. Sim presented a prima facie case for her retaliation claim

Respondent L&I contends that Ms. Sim's termination is far too attenuated from her statutorily protected activity and that decision maker had no knowledge of the statutorily protected activity. An employee proves causation "by showing that retaliation was a substantial factor motivating the adverse employment decision." *Allison v. Hous. Auth.*, 118 Wash.2d 79, 96, 821 P.2d 34 (1991). At the summary judgment stage, the plaintiff's burden is one of

production, not persuasion. *Scrivener*, 181 Wash.2d at 445, 334 P.3d 541. Thus, to avoid summary judgment on causation, the employee must show only that a reasonable jury could find that retaliation was a substantial factor in the adverse employment decision. *Scrivener,* Id. Employees may rely on the following facts to show this: (1) the employee took a protected action, (2) the employer had knowledge of the action, and (3) the employee was subjected to an adverse employment action. *Cornwell v. Microsoft Corporation,* 430 P.3d 229 (Wash. 2018).

1. Ms. Sim presented sufficient evidence on the issue of knowledge and causation

Ms. Sim's grievance was filed by her union and addressed to the Appointing Authority: Vickie Kennedy. (CP 222). The grievance was filed in response to Chris Huynh's letter of reprimand. Ms. Sim asserted in the grievance that the letter of reprimand was issued in violation of the CBA Article 2 Non- Discrimination policy and Article 27.1, no discipline without just cause. (CP 222).

In response to the grievance, Ms. Jonnita Thompson, Chief Administrative Officer, as delegate of Victoria Kennedy Asst. Director of Insurance Services, met with Ms. Sim and her union

rep. (CP 217). Due to the inability to informally resolve the grievance between the department and decision-maker Victoria Kennedy directed L&I staff, Lynne Buchanon, to conduct an investigation. (CP 217) Ms. Buchanon interviewed Ms. Sim's previous supervisor, Michelle Schiller, current supervisor Chris Huynh, and Ms. Sim's co-workers. (CP 69). Ms. Sim's grievance was denied by Ms. Jonnita Thompson on December 16, 2015. (CP 224). Based on these facts, decision-makers Vickie Kennedy, Jonnita Thompson, Michelle Schiller and Chris Huynh had knowledge of Ms. Sim's exercise of her statutorily protected activity.

Employer knowledge also extends to Ms. Sim's new supervisor, Mr. Jimmy Huynh, who supervised her during her trial service period. Both the Court of Appeals and several federal courts require that the employer have actual knowledge of the employee's protected action in order to prove causation. A decision-maker need not have actual knowledge about the legal significance of a protected action. Instead, the decision-maker need have actual knowledge only that the employee took the action in order to prove a causal connection. RCW 49.60.210(1). *Cornwell v. Microsoft*, *Id.*

"The proper inquiry is whether the ... evidence suggests a causal connection between the protected activity and the subsequent adverse action sufficient to defeat summary judgment." *Reich v. Hoy Shoe Co*., 32 F.3d 361, 367 (8th Cir. 1994).

Here, Ms. Sim asserts that there is a causal connection between her protected activity and subsequent adverse action. While undergoing the trial service period, Mr. Jimmy Huynh was Ms. Sim's supervisor. Mr. Jimmy Huynh is Mr. Chris Huynh's brother and both hold managerial positions for the same agency. Circumstantial evidence supports the reasonable inference that Mr. Jimmy Huynh had knowledge of Ms. Sim's statutorily protected activity against his brother and that retaliation was a substantial factor when her terminated her.

2. Ms. Sim suffered a series of adverse harm from the decision makers as a result of her constitutionally protected activity

In *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U. S. 53, 126 S Ct 2405, 165 L Ed 2d 345 (2006), the U.S. Supreme Court held that and "'adverse employment action" is defined as a 'materially adverse change in the terms and conditions' of

employment." The Court also extended the scope of the anti-retaliation provision to include, "employer actions that would have been materially adverse to a reasonable employee…and harmful to the point that they could well dissuade from making or supporting a charge of discrimination. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U. S. 53, 126 S Ct 2405, 165 L Ed 2d 345 (2006).

Following Ms. Sim's grievance, Ms. Sim experienced a series of adverse action by decision-makers over the span of two years, all of whom had knowledge of her statutory protected activity. This adverse action did not just include her termination but the letter of potential discipline which

was issued on October 30, 2015, six months after her grievance was filed, (CP 261-266), reduction in pay letter on January 6, 2016, which was based on two administrative errors, and which cited the October 30, 2015 letter (CP 224-227), recommendation for disciplinary action on June 14, 2016 for purportedly not meeting work expectations (CP 268-271), forced demotion on January 9th, 2017, (CP 242-43, 322), trial service period from February 16, 2017 – August 10, 2017 where Ms. Sim was held to higher metrics than stated in performance plan and abruptly ending when she met both accuracy and productivity requirements, and termination on August 15, 2017. These adverse actions materially affected the terms and conditions of her employment and are harmful enough to dissuade her from making further allegations and dissuade any employee in the pension department to support such an allegation. Therefore, Ms. Sim presented sufficient evidence to establish a causal link between her statutorily protected activity and adverse action.

3. The adverse harm she suffered was not too attenuated in time from her constitutionally protected activity

Ms. Sim suffered a series of adverse harm from the decision makers as a result of her constitutionally protected activity when she filed her grievance against Mr. Chris Huynh on April 21, 2015 (CP 222). From that point forward, Mr. Chris Huynh targeted Ms. Sim in retalia tion through a letter of discipline leading to a reduction in pay, forced demotion and eventual termination. The adverse harm she suffered was not too attenuated in time from her constitutionally protected activity as Respondent L&I asserts as the series of adverse actions against began just 5 months after Ms. Sim filed her grievance.

Additionally, Respondent L&I argues that Appellant Sim must show proximity in time between the protected activity and the employment action, when coupled with evidence of satisfactory work performance. Here, Ms. Sim when began to pass both her accuracy threshold and her productivity threshold during her trial service period (CP 128-31, 187-91) evidencing that she was meeting expectations, she was immediately informed that her

trial service would end citing that she was "not meeting work expectations" by Jimmy Huynh. (CP 56). Here, the adverse harm was not too far attenuated as employer's adverse harm of abruptly ending Ms. Sim's trial service period early took place immediately after Ms. Sim showed evidence of satisfactory work performance.

III. CONCLUSION

Ms. Sim has more than met her burden to defeat summary judgment by showing a question of material fact to her discrimination and retaliation claims. For the reasons stated above, Ms. Sim has presented sufficient evidence for a reasonable jury to find in favor of the Plaintiff on all claims against Respondent L&I. Therefore, the trial court's decision granting summary should be reversed.

Respectfully submitted, June 21, 2022.

Pursuant to RAP 18.17(b), I certify that this brief contains 3,770 words

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Signature

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